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No. 94-911

In the Supreme Court of the United States

October Term, 1994

KEITH RICHARD DOLNY,

Petitioner,

vs.

ROBERT ERICKSON, Warden,
MINNESOTA STATE PRISON,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

Charles Diemer
Assistant County Attorney
Counsel of Record
James C. Backstrom
Dakota County Attorney
Dakota County Judicial Center
1560 West Highway 55
Hastings, Minnesota 55033
(612) 438-4438

1994 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

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QUESTIONS PRESENTED

I.

Is there a confrontation clause violation of the U.S. Constitution when Petitioner was given adequate opportunity for cross examination of a young victim of a criminal sexual assault when the victim testified at trial and the trial court allowed other persons including a treating psychologist to testify to out of court statements made by the victim pursuant to Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139 (1990)?

II.

Does the United States Supreme Court have jurisdiction pursuant to U.S. Supreme Court rule 15.4 to hear a case of a habeas corpus petitioner when the petitioner has been out of custody for more than one year and the habeas corpus petitioner will have completed his parole on January 31, 1995?

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STATEMENT OF THE CASE

Petitioner, Keith Richard Dolny, was convicted in Minnesota State Court of two counts of Criminal Sexual Conduct in the First Degree. As a result of that conviction, he was sentenced to 43 months in prison. The Petitioner was not required to start serving the sentence until after he lost his direct appeal. His prison term started July 1, 1991. He was released from custody in November, 1993, and his parole is due to expire January 31, 1995.

K.S., a 6-year-old girl, told her mother and investigators, testified at a pre-trial hearing, and testified at trial that when she was 4 years old, she was sexually abused and threatened by Petitioner. K.S. testified Petitioner sat on her legs, took her clothes off and put his finger in her vagina (P.T., p. 8; T.T., p. 46, 49, 123-124, 182, 298). When she cried, he would slap her (P.T., 8). Petitioner physically hurt K.S. (P.T., p. 9, 312). Petitioner told K.S. he had guns and he would shoot K.S. and kill her if she told anyone about the sexual abuse (P.T., p. 17, 23-24; T.T., p. 48-50, 52). Petitioner asked K.S. to kiss him on his private parts and he licked her private parts, referring to her vagina (P.T., p. 22, 33; T.T., p. 59-60). Petitioner tried to shove her in the oven in the kitchen to get her to cooperate with the sexual abuse and to convince K.S. not to tell (P.T., p. 23-24; T.T., p. 57, 202). K.S. had frequent nightmares that Petitioner was going to get her and was going to sexually abuse her (P.T., p. 29; T.T., p. 61-62, p. 182-186). K.S. was frightened by Petitioner (T.T., p. 52, 125). When K.S. described the sexual abuse to her mother, she was ashamed, shaky, crying and felt like she had done something wrong (T.T., p. 204). K.S. said Petitioner tried to put his penis inside of her vagina and that her vagina was wet after that. She then went to the bathroom to clean herself off (T.T., p. 259, 298). Petitioner made her touch his penis with her hands (T.T., p. 297-298). K.S. said Petitioner did these

things to her more than once, and talked about three times. She had a stronger recollection of one incident than the others (T.T., p. 293-310). Petitioner was convicted by a jury of two counts of Criminal Sexual Conduct in the First Degree. On July 17, 1990, Petitioner was sentenced to 43 months in prison. The sentence was stayed pending appeal and on July 1, 1991, the Petitioner commenced serving his sentence.

The mother of K.S. testified that she had found rotten eggs in K.S.'s room on Mother's Day, May 14, 1989 (P.T., 8). Prior to this discovery, K.S. would have a bad dream once or twice a week. The bad dream was that Petitioner was going to get her (P.T. 12). The mother told K.S. that K.S. should have told her about hiding these eggs then asked K.S. if K.S. was keeping other things from her and what K.S. was afraid of (P.T., 6-10, 33-34; T.T., 181-182). It was at this time that K.S. first told her mother about sexual abuse by Petitioner. The mother responded appropriately by first calling a child psychologist the next day and then the police (P.T., p. 13-14; T.T., p. 181-190).

Randy Pottebaum, a clinical child psychologist, testified that K.S. was anxious and frightened when talking about the abuse. Burnsville police officer Clark Holden and Dakota County Child Protection worker, Rick Morrisey, both trained investigators dealing with child abuse, took statements from K.S. that were consistent with prior statements (T.T., p. 238-240, 285). The Trial Court specifically found that K.S. did not have a motive to fabricate the sexual abuse (T. 165). The Petitioner appealed to the Minnesota Court of Appeals, which appeal was stayed pending a post-conviction relief hearing before the trial judge. After the trial judge issued his order denying any relief, the Minnesota Court of Appeals affirmed the Petitioner's convictions and the Trial Court then sentenced Petitioner to prison. Petitioner did not seek review of his conviction to the Minnesota Supreme Court even though he was entitled to seek such review. He later sought federal

habeas corpus review pursuant to 28 U.S.C. 2254. Federal magistrate Lebedoff recommended against any relief and in a de novo review, Federal District Judge Diana Murphy concurred with the magistrate. The 8th Circuit Court of Appeals in Dolny v. Erickson, 32 Fed. 3rd 381 affirmed the conviction of the Petitioner finding that there was no confrontation clause violation. The 8th Circuit did not agree with the Federal magistrate or Federal Trial Judge that the Petitioner was procedurally barred from habeas corpus consideration.

REASONS FOR DENYING THE PETITION

Pursuant to U.S. Supreme Court Rule 15.1, Respondent points out that at Page 5 of the Petition for Writ of Certiorari in two places Petitioner indicates that the police only tape-recorded part of the interview. It should be made clear that the officer who was interviewing the minor victim had an initial discussion with the victim to determine what had occurred and once the officer determined what happened, he then took a formal tape-recorded statement.

I. IS THERE A CONFRONTATION CLAUSE VIOLATION OF THE U.S. CONSTITUTION WHEN PETITIONER WAS GIVEN ADEQUATE OPPORTUNITY FOR CROSS EXAMINATION OF A YOUNG VICTIM OF A CRIMINAL SEXUAL ASSAULT WHEN THE VICTIM TESTIFIED AT TRIAL AND THE TRIAL COURT ALLOWED OTHER PERSONS INCLUDING A TREATING PSYCHOLOGIST TO TESTIFY TO OUT OF COURT STATEMENTS MADE BY THE VICTIM PURSUANT TO IDAHO V. WRIGHT, 497 U.S. 805, 110 S.CT. 3139 (1990)?

This Court in Idaho v. Wright, 459 U.S. 805, 110 S.Ct. 3139 (1990), set the standard for out of court statements made by minor victims. The decision occurred after the trial in this case. However, in a post-conviction proceeding, the trial court applied Idaho v. Wright, to this case and found no violation. Thereafter, an appeal to the Minnesota Court of Appeals and Federal appeals followed. In addition, this Court decided White v. Illinois, 502 U.S. _____ 112 S.Ct. 736 (1992). It is clear that the statements made to a treating psychologist by a child victim are admissible under the medical treatment exception to the hearsay rule. Such statements are

firmly rooted hearsay exceptions with the attendant guarantees of reliability and trustworthiness. The trial transcript reveals that the treating psychologist, Dr. Pottebaum testified that he examined the victim for purposes of determining her need for psychotherapy (T.T., p. 94). This case is strikingly similar to Dana v. Department of Corrections, 958 Fed. 2d 237 (1992). The 8th Circuit Court of Appeals affirmed the admissibility of the testimony of a psychologist and pediatrician regarding a victim's hearsay statements in Dana. Dana was convicted in Minnesota State Court of two counts of First Degree Intrafamilial Sexual Abuse and given consecutive 43 month sentences. This Court denied review 112 S.Ct. 3043 (1992). In Dana and the present case, sexual assaults were committed by a significant other in the child's life. Both cases involved the application of the standard set forth in Idaho v. Wright, supra, White v. Illinois, supra, Minnesota Rules of Evidence, a Minnesota State Statute authorizing the testimony and applicable Minnesota Supreme Court decisions.

This court in Lanam v. Minnesota denied a Petition for Writ of Certiorari to the Minnesota Supreme Court, 111 S.Ct. 693 (1991). In Lanam, a male baby-sitter was convicted of two counts of Criminal Sexual Conduct in the First Degree for engaging in sexual penetration with a 3 1/2 year old girl. The young victim was found incompetent to testify. Out of court statements to a foster care provider and two social workers were used as a basis to convict Lanam. Lanam appealed to both the Minnesota Court of Appeals and the Minnesota Supreme Court making claims of confrontation clause violations. The Minnesota Supreme Court affirmed his convictions, 459 N.W.2d 656 (1990). The present case is strikingly similar to Lanam except the victim in the present case testified. There is no reason to grant review.

In the present case, the victim testified and was subject to cross-examination. Part of this testimony was live before a jury and the bulk of it was via videotape. Petitioner in his

request for a Writ of Certiorari selectively uses over 500 pages of trial transcript to try to make it appear there was insufficient evidence to justify a conviction or that the victim had been coached into making the allegations of abuse. Neither is correct. Petitioner testified at his trial. He never gave any indication of any animosity by the young victim or his ex-wife which would be so intense as to have the ex-wife convince her daughter to make up this story or for the daughter to make up this story. The Petitioner is the step-dad of the victim and thus has no visitation rights. At the time of the reporting, Petitioner was not a part of the life of the victim or the ex-wife. A child of such tender years could not fabricate the sexual conduct complained of.

II. DOES THE UNITED STATES SUPREME COURT HAVE JURISDICTION PURSUANT TO U.S. SUPREME COURT RULE 15.4 TO HEAR A CASE OF A HABEAS CORPUS PETITIONER WHEN THE PETITIONER HAS BEEN OUT OF CUSTODY FOR MORE THAN ONE YEAR AND THE HABEAS CORPUS PETITIONER WILL HAVE COMPLETED HIS PAROLE ON JANUARY 31, 1995?

The plain purpose of habeas corpus is to allow persons who are confined to challenge procedures used to convict them. In fact, 28 U.S.C. 2254(1) has as a requirement that the person be "in custody" to bring a petition for a writ of habeas corpus. To continue to hear a case and use scarce judicial resources when the Petitioner is no longer in custody does not comply with the plain words of the statute. It was revealed at oral argument before the Eighth Circuit Court of Appeals that the Petitioner was no longer in custody. Although some would allege that being on parole is a significant intrusion into a person's life and, therefore, jurisdiction should still attach,

even parole for the Petitioner will end on January 31, 1995. This would be significantly before this Court could reach any decision on the merits of the case. The State of Minnesota requests that the Court in its order denying relief specifically find that habeas corpus relief is dependent upon strict compliance with statutory requirements. 28 U.S.C. 2241(c), provides "the writ of habeas corpus shall not extend to a prisoner unless:

1. He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof."

In addition, 28 U.S.C. 2254 requires the petitioner be "in custody".

The Court should review its willingness to hear habeas corpus cases when the person is not in custody. The Court has fashioned a "collateral consequences" extension to the requirement of custody which is not found in the statute. This Court has repeatedly stated that habeas corpus is an extraordinary writ. The Respondent believes that as such, strict compliance with the requirements of the writ must be enforced. It has been over a decade since this Court wrote about collateral consequences as being a valid basis to invoke habeas corpus jurisdiction. In Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, in a footnote the Court indicated jurisdiction attached and the case was not moot because of collateral consequences. More recently in Maleng v. Cook, 490 U.S. 488, 109 S.Ct. 1923 (1989), this Court found it had jurisdiction to review a case where a state sentence had expired but such conviction enhanced a Federal sentence for which the accused was in custody.

As recently as 1960, this Court in Parker v. Ellis, 362 U.S. 574, 80 S.Ct. 909 found that a case was moot and the Court did not have jurisdiction in a habeas corpus case where

the accused was no longer in custody. In Parker v. Ellis, the Court cited three similar cases where it denied relief because of mootness. McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24 (1934); Johnson v. Hoy, 227 U.S. 245, 33 S.Ct. 240; Ex Parte Baez, 177 U.S. 378, 20 S.Ct. 673 (1900). Therefore, in the first 60 years of this century, this court required custody for a Habeas Petitioner to go forward. In 1968, eight years after Ellis, in Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556 (1968), this Court overruled Parker v. Ellis. In overruling Ellis and its underpinnings, this Court decided to stray from enforcing the strict words of the statute and the long underlying history of the writ of habeas corpus. Considering, the long history of the strict construction of the availability of the writ of habeas corpus, this relatively short detour should come to an end and the Court should put the law back on the main highway of considering the Writ of Habeas Corpus as an extraordinary writ. This Court is familiar with the amount of litigation one criminal conviction can generate. Habeas corpus petitioners have had their convictions reviewed by appellate courts or are in procedural default for failing to appeal. Habeas corpus litigation must end when physical custody ceases.

CONCLUSION

There has been no error in the decisions of the state trial court, the Minnesota Court of Appeals, the Federal Magistrate, Federal District Judge or the Eighth Circuit. This court should deny further review. In its denial of review, the court should rule the Habeas Petitioner's case is moot because he is not in custody.

Dated: December 21, 1994.

Respectfully submitted,

Charles A. Diemer
Assistant Dakota County Attorney
Counsel of Record
James C. Backstrom
Dakota County Attorney
Dakota County Judicial Center
1560 West Highway 55
Hastings, MN 55033
Telephone: (612) 438-4438